Filed 4/26/10 Farokhzadeh v. Too Faced Cosmetics CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

SARAH FAROKHZADEH, Plaintiff and Appellant, v. TOO FACED COSMETICS, INC., et al., Defendants and Respondents.	B213306 (Los Angeles County Super. Ct. No. BC386192)

APPEAL from an order of the Superior Court of Los Angeles County, William F. Highberger, Judge. Affirmed.

Milstein Adelman & Kreger, Peter J. Farnese, Wayne S. Kreger, and Donald A. Beshada for Plaintiff and Appellant.

Burkhalter Kessler Goodman & George, Eric Goodman and Rosamund M. Lockwood for Defendants and Respondents.

Sarah Farokhzadeh filed a false advertising class action complaint against the marketer and a retailer of a tube of lip gloss which she purchased, she alleges, because she thought it would help her lose weight. The trial court denied Farokhzadeh's motion for class certification, and she filed the instant appeal. We affirm the trial court's order.

FACTS

Some time during the second week of January 2008, Farokhzadeh walked into a retail store operated by Sephora USA, Inc., and paid "about like $20" in cash for a tube of "FUZE® Slenderize Guilt Free Lip Gloss" (Fuze lip gloss) marketed by Too Faced Cosmetics, Inc. Prior to purchasing the Fuze lip gloss, Farokhzadeh had not seen any advertisement regarding the product. She bought the Fuze lip gloss because she liked lip gloss, knew about the Too Faced company's products from her past experiences with cosmetics, and "mainly read the display" in the store which stated, "Always on the lips . . . Never on the hips!"

About two weeks later, Farokhzadeh was using her tube of Fuze lip gloss in front of a friend, Arash Khorsandi, with a "legal background." Khorsandi "saw the whole Slenderize" printing on the tube and asked Farokhzadeh "if it work[ed]." When Farokhzadeh said no, a conversation ensued in which Khorsandi said something to the effect, "like, oh, you should contact [a lawyer]." A day or two later, Farokhzadeh called Khorsandi, and he referred her to the law firm of Milstein, Adelman & Kreger. Although Farokhzadeh knew that her tube of Fuze lip gloss was not helping her to lose any weight, she never made any effort to return it to the Sephora store because, in her own word, of "laziness."[1]

[1] Farokhzadeh still had the tube of Fuze lip gloss in her purse at the time of her deposition in late October 2008, but said she was "[n]ot really" using it anymore.

Farokhzadeh, represented by the Milstein firm, filed a class action complaint against Too Faced and Sephora. Her complaint alleges three causes of action: (1) false and misleading advertising in violation of the Unfair Competition Law (UCL; Bus. & Prof. Code, § 17200 et seq.); (2) false and misleading advertising in violation of the False Advertising Law (Bus. & Prof. Code, § 17500 et seq.); and (3) violation of the Consumer Legal Remedies Act (Civ. Code, § 1750 et seq.).[2] The main claim in Farokhzadeh's complaint is her allegation that Too Faced and Sephora "made many false and misleading statements and claims about Fuze [lip gloss] in the advertising of that product," including that it helped consumers: "slenderize;" "energize;" lose weight in the hips (and that it helped Hollywood stars in the same manner); maintain a "normal appetite;" "suppress[] the appetite;" and increase "energy" and "metabolism."

Farokhzadeh's complaint alleges that Sephora and Too Faced did "not have competent and reliable scientific evidence to substantiate [their] claims . . . ." The complaint prays for an order enjoining defendants from pursuing their advertising, and for restitution to Farokhzadeh and all members of the class.

Farokhzadeh filed a motion for certification of a class of plaintiffs comprised of California residents who purchased Fuze lip gloss for personal use from December 15, 2007, through the present. Farokhzadeh's evidence in support of her motion showed that Too Faced, and a beverage company which is not a party in the current appeal, had agreed in 2007 to implement a "co-branding" marketing campaign for their respective Fuze products. Advertising for Fuze lip gloss started in late 2007 or early 2008, and disseminated the following statements (and similar statements) through internet advertising, internet websites, in-store events and "point-of-purchase displays" in selected retailers' stores:

> "a. 'Start the New Year keeping all those beauty and diet resolutions on track with a lip gloss that will keep you supermodel skinny?!';

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[2] Claims involving other products are not relevant to the current appeal.

"b. 'Application of this long-lasting, high shine formula will actually help suppress one's appetite for food without sacrificing delicious glamour.';

"c. 'With a simple swipe of the tube, FUZE Slenderize Guilt Free Gloss provides a pretty, plump pout with an added bonus of *healthy, energy boosting, appetite curbing ingredients* that taste just like its FUZE Slenderize [beverage] counterpart.'

"d. '[T]he inner core of each gloss is infused with the [additives] **Chromium, L-Carnitine,** and **Super Citrimax** — the same energizing and slenderizing components found in FUZE Slenderize beverages.'

"e. 'Super Citrimax — Helps maintain a normal appetite and increases energy in healthy individuals, while supporting a healthy metabolism.'

"f. 'As you dab the guilt-free gloss on your lips, you'll be helping suppress your appetite for food.'

"g. 'Beautifying and energizing: Guilt Free gloss will make you shine on the outside as it delivers healthy, energy boosting, appetite curbing ingredients to your inside.' " (Underscore omitted.)

Too Faced and Sephora opposed Farokhzadeh's motion for class certification on the grounds that she had failed to demonstrate the required community of interests to pursue her class action. More specifically, Sephora and Too Faced argued that individual issues related to reliance – class members' exposure to different advertising in different contexts – and restitution – class members' monetary losses – would predominate over common issues. In taking such a tack, Too Faced and Sephora largely acknowledged the content of their advertising campaign.[3]

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[3] According to Jeremy Johnson, Too Faced's president, the Fuze advertising campaign included, at least in part, "tongue in cheek" statements intended to project the company's "young Hollywood" cachet. Within days of learning about Farokhzadeh's lawsuit, Too Faced "pulled" all of its advertising. In other words, Farokhzadeh's prayer for injunctive relief is moot. Farokhzadeh is the only person about whom Johnson had ever heard who complained she did not lose weight from using Fuze lip gloss.

Approximately six months before the Supreme Court issued its opinion in *In re Tobacco II Cases* (2009) 46 Cal.4th 298 (*Tobacco II*), the trial court denied Farokhzadeh's motion for class certification for the following reasons:

> "On balance, the Court, in the exercise of its discretion, has determined that plaintiff . . . has failed to show: (1) typicality, (2) commonality, and (3) adequacy of the proposed class representative. . . . While presumed reliance by all or most class members flowing from a common marketing scheme . . . remain[s] good law after the passage of Proposition 64 in 2004, plaintiff tries to gloss over the change in the law . . . worked by Proposition 64, which added a new, separate element for successful UCL claim. That element is that a party must show that one has 'suffered injury in fact and has lost money or property as a result of such unfair competition.' [(Bus. & Prof. Code, § 17204.)] Defendants have raised a serious factual question as to whether plaintiff will be able to meet the standing requirement as to her own claim as to her purchase of Fuze . . . [l]ip [g]loss given that: (a) 'laziness' was the reason she did not return it for a refund, (b) she still had the product in her possession available for use, and (c) she had in fact used it as lip gloss after filing suit notwithstanding her obvious awareness that she disbelieved any weight-loss marketing claims made during her original purchase of the product. Since at least one of the other lip gloss products which she acknowledged buying and using was more expensive that the Fuze . . . product (even without a claim of weight-loss attributes), there is a bona fide question as to whether the class representative has 'lost money,' and, if so, how much by buying and using the Fuze product even if it lacks claimed appetite-suppression features. Thus, there is a bona fide factual question as to whether plaintiff has any standing and thus she lacks the needed 'typicality' to be an adequate class representative.
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> "Likewise, since the Court believes that any class member will have to prove individual standing to be able to share in a restitutionary recovery if the class is contested (as is presently the case), then the separate needed element of 'commonality' is lacking due to the uncertainty as to whether each class member bought the product only because of apparently false weight-loss claims or for one or more other reasons.
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> "Finally, plaintiff has demonstrated that only she bought the product for about $20, that she has failed to return it for refund despite her awareness of retailer Sephora's 'good customer service' policy due to her own 'laziness,' that she found her way to counsel only after an unemployed lawyer friend suggested that she bring a class action suit, and that she works for Wells Fargo bank in some capacity. The Court does not find that

this is an adequate showing that she is an appropriate fiduciary to represent the interests of absent class members."

Farokhzadeh filed a timely notice of appeal.

DISCUSSION

I. Absent Class Members Standing

Farokhzadeh contends the trial court's order denying class certification must be reversed because the court abused its discretion in ruling that each class member "must individually establish the Proposition 64 standing requirements." Although the abuse of discretion standard is not the proper test for examining the correctness of the trial court's interpretation of Proposition 64, we agree with Farokhzadeh — as a matter of law — that the absent members of a class are not required to establish their individual standing under Proposition 64. This issue has been resolved in Farokhzadeh's favor by *Tobacco II*, *supra*, 46 Cal.4th 298, in which the Supreme Court ruled that only the named plaintiff class representative must establish standing. (*Id*. at pp. 314-324.)

Although the trial court did not predict the standing rule which later came to exist in regard to absent class members, we disagree with Farokhzadeh that this mandates reversal of the order denying her motion for class certification. The trial court also ruled on the question of Farokhzadeh's standing. Because we find that issue was correctly decided, we will not reverse the order denying class certification based upon an issue concerning the absent class members.

II. Farokhzadeh's Standing

Farokhzadeh has standing to prosecute an action for a violation of the UCL in the event she is a "person who has suffered injury in fact *and* has lost money or property *as a result of* the unfair competition." (Bus. & Prof. Code, § 17204, italics added.) The "causation" aspect of this standing provision was clarified in *Tobacco II* to mean the following: a plaintiff must establish that a defendant's activities in violation of the UCL were an "immediate cause" of injury, but is not required to establish that the defendant's activities were the "sole or even the decisive cause" of plaintiff's injury. (*Tobacco II*, *supra*, 46 Cal.4th at p. 328.) The term "injury in fact" means an " '[a]ctual or imminent

invasion of a legally protected interest, in contrast to an invasion that is conjectural or hypothetical.' " (*Hall v. Time, Inc*. (2008) 158 Cal.App.4th 847, 853, quoting Black's Law Dict. (8th ed. 2004) p. 801.) In the transactional context presented by the current case, the term "has lost money" means an actual expenditure of money in exchange for a product that was either "not want[ed]," "unsatisfactory," or "worth less than what [the person] paid for it." (*Id*. at pp. 854-855.)

We find that Farokhzadeh established "injury in fact" for standing by showing an invasion of a legally protected interest. Consumers have a legally protected interest against being subjected to false advertising. We also find the causation element for standing is satisfied because Farokhzadeh's evidence established an "immediate" causal connection between one of defendants' advertising activities and her decision to buy Fuze lip gloss — she testified at her deposition that she bought her tube of Fuze lip gloss because she "mainly read the display" in the store which stated, "Always on the lips . . . Never on the hips!"

We further find Farokhzadeh lost money in connection with her decision to purchase Fuze lip gloss. The trial court found that Farokhzadeh had not "lost money" because she paid $20 for lip gloss, and received a like-exchanged value in return for her money — a lip gloss which satisfied her standards for color, shine and texture.
In reaching its decision, the trial court implicitly defined a loss of money to be limited to the situation where a consumer pays for a product which is "worth less than what [the person] paid for it." (*Hall v. Time, Inc.*, *supra*, 158 Cal.App.4th at p. 855.) However, we agree with Farokhzadeh that the trial court's construction of the phrase "has lost money" was too limited. Although a "moral injury" does not constitute a loss of money for purposes of standing (see *Animal Legal Defense Fund v. Mendes* (2008) 160 Cal.App.4th 136, 147), we find that a consumer "has lost money" when he or she buys a product which does not meet the product's represented qualities as judged by its performance.
A contrary rule would carve too large a swath through the field of law prohibiting false advertising. Farokhzadeh's case is not akin to the situation involved in an action alleging

that a product was packaged with a misleading identification label. (Cf. *Kwikset Corp. v. Superior Court* (2009) 171 Cal.App.4th 645, review granted June 10, 2009, S171845.)

In summary, we agree with Farokhzadeh that she has standing to prosecute a claim under the UCL based upon the defendants' allegedly false, weight-loss advertising. The remaining issue is whether she made a sufficient showing to require certification of her class action based on such a claim.

III. Adequacy as a Class Representative

Farokhzadeh contends the trial court's order denying class certification must be reversed because the trial court abused its discretion in finding that she failed to establish that she would be an adequate class representative. We disagree.

Although it may have been reasonable for the trial court to have concluded that Farokhzadeh would adequately represent the interests of the absent class members in that she is the only known person in California to have actually objected that she had been induced to buy Fuze lip gloss in the belief she would lose weight, this does not mean that the trial court's contrary conclusion is necessarily unreasonable. There is substantial evidence in the record supporting the trial court's conclusion that Farokhzadeh had no interest in vindicating her own consumer rights, let alone protecting the rights of any other consumer. In fact, she did nothing until after she had been prompted by a friend with a legal background to "contact [a lawyer]." By her own admission, she suffered from "laziness" when it came to vindicating her own rights.[4] We believe that the trial court reasonably concluded that she was not a person who would willingly assume the fiduciary responsibility to prosecute a UCL action on behalf of the absent class members. (*Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1434.) Because we reach this conclusion, we need not resolve the issues of typicality or commonality. (*Linder v. Thrifty Oil Co*. (2000) 23 Cal.4th 429, 435-436.)

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[4] We agree with Farokhzadeh that she was not required to return her Fuze lip gloss for a refund in order to attain the status of an adequate class representative, but find she misses the point. Her "laziness," exemplified by her failure to do anything at all, could be considered by the trial court in assessing whether she would work to protect the interests of the absent class members.

DISPOSITION

The trial court's order dated November 24, 2008, denying the motion for class certification, is affirmed. Respondents to recover their costs on appeal.

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BIGELOW, P. J.

We concur:

RUBIN, J.

FLIER, J.